UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SAMMIE WHITAKER and TERRIAN J. SCOTT WHITAKER,

Petitioners,

-vs-

SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, *et al*.

Respondents.

DECISION and ORDER
09-MC-6003-CJS

APPEARANCES

For Petitioners:

Sammie Whitaker *pro se*
230 Milford Street Apt. B4
Rochester, NY 14615

Terrian J. Scott Whitaker *pro se*
c/o Sammie Whitaker
230 Milford Street Apt. B4
Rochester, NY 14615

For Respondents:

Gail Y. Mitchell, A.U.S.A.
United States Attorney's Office
Federal Centre
138 Delaware Avenue
Buffalo , NY 14202

INTRODUCTION

Siragusa, J. This is a an action where Petitioners are seeking a writ of mandamus directing Respondents to process their applications for naturalization under 8 U.S.C. § 1421 *et seq*. Before the Court is Respondents' motion to dismiss the petition for lack of

jurisdiction. For the reasons below, Respondents' motion is granted and the petition is dismissed.

BACKGROUND

In their mandamus petition, Sammie Whitaker and Terrain J. Scott Whitaker ("Petitioners"), a husband and wife, seek relief pursuant to 28 U.S.C. §§ 1421 et seq., based on their allegation that "on or about March 26, 2008, Petitioner filed his/her application for naturalization, under 8 U.S.C.A. 1421 et seq. with Respondents at Immigration & Naturalization Service Center 75 Lower Welden St. Saint Albans, VT 05479-0001." (Petition ¶¶ 1, 3.) They contend that Respondents have not interviewed them and that, "[i]n violation of the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq., Respondents are unlawfully withholding or unreasonable delaying action on Petitioner's [sic] application and has [sic] failed to carry out the adjudicative functions delegated to them by law with regard to Petitioner's [sic] case." (*Id*. ¶ 10.)

Respondents contend that,

> Representatives of USCIS,[1] have advised that Sammie Whitaker, the husband of Terrain Scott Whitaker, filed a Petition for Alien Relative (form I-130) on behalf of Terrain Scott Whitaker. *See* Shelby Declaration, ¶ 5. Representatives of USCIS, have further advised that Terrain Scott Whitaker has neither applied for nor been denied naturalization to U.S. Citizenship. *See id*. Further, representatives of USCIS advise that Terrain Scott Whitaker has neither applied for nor been denied adjustment of status. *See id*. Based on these facts, as set forth in the Shelby Declaration, respondents submit that the Court lacks jurisdiction over the claims set forth in the petition.

[1]United States Citizenship and Immigration Services.

(Mitchell Aff. ¶ 9.) The Court issued a motion scheduling order, directing Petitioners to respond by May 15, 2009. As of the date of this decision and order, no response has been received.

STANDARDS OF LAW

Petitioners assert that this Court has jurisdiction over their petition under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*., and the Declaratory Judgment Act, 28 U.S.C. § 2201. "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. *See Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996)." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

Federal Rule of Civil Procedure 12(b)(1) provides that, "a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction…." As the Second Circuit wrote in *Makarova*:

> A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *See* Fed. R. Civ. P. 12(b)(1). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court…may refer to evidence outside the pleadings.

Makarova, 201 F.3d at 113. The Constitution's Article III establishes the basis for jurisdiction in the federal courts, and, as the Supreme Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), requires the showing of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized…and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly…trace[able] to the challenged action of the defendant, and not…the result [of] the independent action of some third

> party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (citations omitted).

ANALYSIS

It is undisputed that no application for naturalization was ever filed with or denied by Respondents. (Selby Decl. ¶ 5.) As a result, there is no actual, imminent injury in fact traceable to the alleged inaction of Respondents. Accordingly, the Court is without jurisdiction to adjudicate the petition.

CONCLUSION

Petitioner's petition (Docket No. 1) for a writ of mandamus is dismissed for lack of jurisdiction. The Clerk is directed to close the case.

IT IS SO ORDERED.

Dated: May 20, 2009
Rochester, New York

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge